Supreme Court, U.S.
FILED
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No. 02-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

WEST 41ST STREET REALTY LLC, EMM REALTY CORP., and TIMES SQUARE GARAGE, LTD.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, 42ND ST. DEVELOPMENT PROJECT, INC., 632 EIGHTH AVENUE ASSOCIATES, LLC, ROMACK REALTY CORP., and THREE O REALTY LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. May the respondents, consistently with the Due Process and Takings Clauses of the United States Constitution, use the eradication of "blight" as the purported public purpose for condemning the petitioners' property and giving it to another private party to develop, when the petitioners wish to develop their own property, and any residual "blight" is the result of the respondents' own actions in preventing the petitioners from developing their property?

2. Do the respondents' actions in preventing the development of the petitioners' property for more than two decades, followed by their attempt to use the undeveloped condition of the property as the basis for turning it over to another private party to develop, violate the petitioners' rights under the Due Process and Takings Clauses of the United States Constitution?

Statement Pursuant to Supreme Court Rule 29.6

Petitioners West 41st Street Realty LLC, EMM Realty Corp., and Times Square Garage, Ltd. are privately-owned entities. They have no parent corporations, and there is no publicly held company that owns 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The order of the Court of Appeals of the State of New York, dated September 12, 2002, dismissing the petitioners' appeal from the decision and order of the Supreme Court of the State of New York, Appellate Division, First Department, is not officially reported, and is reproduced in Appendix A (1a-2a).

The decision and order of the Supreme Court of the State of New York, Appellate Division, First Department, dated June 20, 2002, is reported at 298 A.D.2d 1, 744 N.Y.S.2d 121, and is reproduced in Appendix B (3a-11a).

Jurisdiction

The order of the Court of Appeals of the State of New York sought to be reviewed was entered on September 12, 2002. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1, because it is being filed within 90 days of the entry of the order sought to be reviewed. This Court has jurisdiction to review the order of the New York State Court of Appeals pursuant to 28 U.S.C. § 1257(a). Because 28 U.S.C. § 2403(b) may apply, the Attorney General of the State of New York is being served with a copy of this petition pursuant to Supreme Court Rule 29.4(c).

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution reads in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution reads in pertinent part as follows:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Statement of the Case

A. The Times Square Redevelopment Project

The Times Square Redevelopment Project is a long-running project of The City of New York (the "City") and the respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation ("UDC") to redevelop the Times Square area of Manhattan (R. 71).[1]

The Times Square Redevelopment Project was initiated by a Memorandum of Understanding dated June 27, 1980 between the UDC and the City (R. 86-89). The Memorandum of Understanding stated that the Times Square area, loosely defined as the area "in the vicinity of 42nd Street and 7th and 8th Avenues," was "marked by street crime, substandard and insanitary conditions, undesirable uses and physical and social blight," warranting "public action to cause the replanning, clearance, reconstruction, redevelopment and rehabilitation of the Project Area" (R. 86).

The UDC and the City divided the Project area into twelve numbered "sites" (R. 94). Site 8 South, which is the subject of this case, comprises the property across the street from the Port Authority Bus Terminal, bordered by 41st Street on the north, 40th Street on the south, and Eighth Avenue on the west, and extending east of Eighth Avenue approximately one-half block (R. 71; *see* R. 136).

On or about October 4, 1984, the UDC made its initial determination and findings approving the Project and authorizing the UDC to acquire, by condemnation if necessary, any real property within the Project area (R. 90-143). The central focus of the Project, as described in the 1984 determination and

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[1] "R." citations are to the printed Record in the Supreme Court of the State of New York, Appellate Division, First Department.

findings, was the construction of new office buildings on Broadway and Seventh Avenue abutting Times Square, and the reconstruction of the theaters located on the north and south sides of the midblock of 42nd Street between Broadway and Eighth Avenue (R. 94-96). With respect to Site 8 (consisting of Site 8 South and Site 8 North, a smaller tract located on the east side of Eighth Avenue between 41st and 42nd Streets), the 1984 determination and findings envisioned the construction of a merchandise mart linked to the Port Authority Bus Terminal by a pedestrian bridge across Eighth Avenue (R. 95, 99, 136).

The UDC's 1984 determination and findings were upheld by the courts. *See Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986). *See also Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44, 45-46 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986). In upholding the 1984 determination and findings, the courts approved the UDC's finding that the Times Square Redevelopment Project as a whole served a public purpose, although they did not address the issue of whether or not there was a public purpose for the merchandise mart proposed for Site 8. *See Jackson v. New York State Urban Dev. Corp., supra*, 67 N.Y.2d at 424-25, 494 N.E.2d at 440-41, 503 N.Y.S.2d at 309-10.

On or about April 18, 1990, the UDC took title by condemnation to nine of the 13 acres within the Project area, including four office building sites, eight theaters, and three other midblock parcels (R. 72, 144). The UDC did not, however, take title to any portion of Site 8 (R. 72). Indeed, the merchandise mart which the 1984 determination and findings proposed for Site 8 was never built.

On or about January 27, 1994, the UDC issued a new determination and findings confirming and updating its 1984 determination and findings (R. 144-162). The 1994 determina-

tion and findings no longer proposed to proceed with the construction of a merchandise mart on Site 8. The 1994 determination and findings did not make a definitive finding with respect to the ultimate use of Site 8 South. Indeed, they did not even make a finding that Site 8 South would necessarily be taken as part of the Times Square Redevelopment Project at all. Instead, they listed a number of possible alternatives for Site 8 South, including:

> (1) A "wholesale mart/office building" with bridges over Eighth Avenue and 41st Street (R. 146, 159); or
>
> (2) Two or more "residential buildings" aggregating approximately 1.0 million square feet and housing about 1,700 to 2,000 residents (R. 159); or
>
> (3) Letting the Times Square Redevelopment Project expire in 2015 without taking and developing Site 8 South at all (R. 159, 160).

While the respondents were thus keeping the fate of Site 8 South in suspense, positive changes in the New York real estate market in general, and in the Times Square area in particular, made the "blight" that the respondents had previously found to exist in the Times Square area in 1984 a thing of the past. As stated by *The New York Times*, "[b]lighted is not a word that anyone would use to describe Times Square today . . . ." Charles V. Bagli, *Companies Get Second Helping of Tax Breaks*, The New York Times, Oct. 17, 1997, p. A1, col. 5, p. B2, col. 1. These developments have removed any possible question as to the willingness of developers to develop Site 8 South without any assistance from government (*see, e.g.*, R. 182-185, 273, 274, 277-278, 299-300).[2]

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[2] The attractiveness of Site 8 South for development is confirmed by the fact that Site 8 North, just across the street from Site 8 South, has recently been purchased by a Milstein family entity for almost three times

The respondents implicitly acknowledged the significance of these positive changes by admitting publicly in 1994 that it might not be necessary for them to take Site 8 South at all (R. 159, 160). Nevertheless, as described below, the respondents refused to permit the petitioners and other landowners in Site 8 South to develop their property, despite repeated attempts on their part to do so.

B. Respondents' Refusal to Permit the Owners to Develop Site 8 South

From the inception of the Times Square Redevelopment Project in 1980, the pendency of the Project, and the UDC's announced intention to take Site 8 South by condemnation, have prevented petitioners and the other landowners in Site 8 South from developing their properties (R. 72). In the face of the looming prospect of condemnation, it is impossible to arrange the financing and the long-term tenant commitments necessary for a major office building development (R. 272, 277). This interference with petitioners' ability to develop their properties continued unabated after 1994, despite the UDC's public admission in 1994 that it might in the end never seek to acquire Site 8 South at all (R. 72-73).

In an effort to regain the ability to develop their properties, 250 West 41st Street Corp., a former owner of the lot later owned by petitioner West 41st Street Realty LLC, and petitioner Times Square Garage, Ltd. commenced an action on statutory grounds against the UDC and others in the Supreme Court, New York County (R. 73). *250 West 41st Street Realty Corp., et al. v. New York State Urban Development Corporation, et al.*, Index No. 112828/97 (R. 163-181). The UDC and the other defendants, far from agreeing to permit the landown-

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the price per square foot that the Times has agreed to pay for Site 8 South (R. 298-299, 318, 413-414, 767).

ers of Site 8 South to develop their properties, vigorously defended the action (R. 73). The action eventually resulted in a determination that the UDC retained the statutory right to condemn Site 8 South. *250 West 41st St. Realty Corp. v. New York State Urban Dev. Corp.*, 277 A.D.2d 47, 715 N.Y.S.2d 407 (1st Dep't 2000), *leave to appeal denied*, 96 N.Y.2d 705, 746 N.E.2d 187, 723 N.Y.S.2d 132 (2001).

In early 1999 Gary Barnett, the Managing Member of petitioner West 41st Street Realty LLC, on behalf of petitioners and other owners of the majority of the square footage included in Site 8 South, contacted UDC and expressed interest in developing the Site on terms which would include the payment of fair market value for the Site (R. 74). Mr. Barnett confirmed this offer in a letter dated March 5, 1999 (R. 182-185), in which he described the capabilities of the developer of which he is President, Intell Management and Investment Company:

> "Intell Management and Investment Company is a national organization which has owned, managed and developed nearly 8 million square feet of office, retail and residential projects located throughout the United States. We are also presently developing the Planet Hollywood Hotel in Times Square, a 50 story, 500 room hotel and retail project on Broadway and 46th Street. We are building the Planet Hollywood project without any tax incentives from the City or State." (R. 185.)

By a letter dated March 17, 1999, 42DP rejected this offer (R. 186). This letter stated that "the State and the City's current thinking is to engage in a competitive process to select the developer" (*id.*).

C. Respondents' Decision to Condemn Site 8 South for the Benefit of the New York Times

Contrary to its previously stated intention of engaging in a competitive process to select a developer for Site 8 South, the UDC in October 1999 commenced unilateral negotiations with the New York Times (the "Times") regarding the possibility of relocating the headquarters of the Times from West 43rd Street to Site 8 South (R. 74). After its negotiations with the New York Times became known, the UDC refused to permit other interested developers to participate in those negotiations or to submit alternative proposals (R. 75).

In June 2000, the UDC and 42DP entered into a Memorandum of Understanding with the Times and its chosen developer, Forest City Ratner Companies, pursuant to which the UDC would acquire Site 8 South by exercising its power of eminent domain and (through 42DP) would lease the Site to the Times and Ratner, which would construct an office building on the Site having an announced square footage of approximately 1,370,000 square feet (R. 75).

On September 4, 2001, the UDC and 42DP issued a notice of a hearing with respect to the proposed acquisition and development of Site 8 South (R. 187-194). In the notice, the UDC and 42DP stated in a single conclusory sentence that the proposed condemnation would serve a public use, which the notice stated was "to continue and reinforce the revitalization of the area, to promote economic and social benefits to the City of New York, and to restore a blighted, deteriorated, substandard, insanitary and underutilized site to full productive use" (R. 193). The notice failed to disclose that any remaining "blight" in Site 8 South would already have been removed by the development of the Site if the respondents had simply allowed the owners of Site 8 South to develop their properties (R. 75-78).

On September 24, 2001, the UDC and 42DP held a public hearing on the proposed condemnation of Site 8 South (R. 195-316). Each of the petitioners appeared at the public hearing in opposition to the proposed condemnation (R. 76). Among other things, the petitioners drew the attention of the UDC and 42DP to the lengthy and unconstitutional suspension of the petitioners' right to develop their property, and to the absence of any factual basis for a finding of public use (*id.*).

For example, Gary Barnett, the Managing Member of petitioner West 41st Street Realty LLC and the President of Intell Management and Investment Company, stated at the hearing:

> "In terms of the process, for nearly twenty years the UDC has kept the land in Site 8 South on hold. No developer has been able to develop and no property owner has been able to develop their property because of the cloud that they've kept on it.
>
> "No compensation has been paid to any of the property owners so far.
>
> "And, in fact, UDC has said they could keep it another ten years and perhaps not even take it at the end of the day.
>
> "Any law that permits this kind of conduct on the part of a government agency is unconstitutional and we believe that the UDC should not be able to rely on an unconstitutional law to take Intell's property now.
>
> "In terms of the public purpose of these proceedings and of the condemnation, we certainly feel very strongly – Intell has plans to develop the property, and this property would already have been developed without the UDC. It's a canard to think that the only way this property would get developed is if UDC

takes it." (R. 272-273.)

Samuel Brach, the President of petitioner Times Square Garage Ltd., spoke to the same effect:

> ". . . . I approached the czar through UDC, Mr. Gargano. I presented him a plan. I arranged to have a developer, presented him a plan and asked him what he would likely okay the plan to develop.
>
> "He told me he would let me know.
>
> "And that happened about three years ago. Never happened.
>
> "Because I'm not New York Times. . . .
>
> "I ask the Board to reject this because it is not fair, it's not right, it's unconstitutional, because after all we bought it before and we should have the right to choose a developer to develop the property." (R. 274-275.)

Similarly, Robert C. Lapin, the President of petitioner EMM Realty Corp., stated:

> "Since 1984, my property has been in limbo. On one hand, I could never develop it because UDC could have condemned it at any time. But on the other hand, the UDC refused to formally condemn it and pay me for the property.
>
> "For seventeen years then I have been without compensation for the many opportunities I have lost to develop my land.
>
> "If the plan goes forward, the UDC will be rewarded for tying up Site 8 South for nearly twenty years without paying anyone for all of the opportunities lost.

> "Any law that allows property to be frozen for this long is unfair and, I believe, unconstitutional. The State should not permit this plan to go forward." (R. 298.)
>
> "Just walk around this area and you will find that the blight, unsanitary and underutilized area no longer is a factor to consider under the label of public use.
>
> "In all regards, this is a gigantic giveaway of the public's funds and private property to The New York Times and Forest City Ratner.
>
> "If both of these entities want this property, they should negotiate in the democratic way with the owners." (R. 299-300.)

On or about November 30, 2001, more than two months after the hearing was concluded, the UDC issued the determination and findings which are under review herein (R. 317-326).

In its determination and findings, the UDC did not contradict in any way the facts stated by the petitioners at the public hearing (R. 78). In particular, the UDC did not deny that for more than two decades it has made it impossible for petitioners and the other landowners in Site 8 South to develop their properties (*see id.*). Nor did the UDC deny that any residual "blight" in Site 8 South would have been eradicated by the development of the property if the UDC had simply permitted such development to proceed (*see id.*).

In the determination and findings, the UDC did not retract the admission in the September 4, 2001 notice of public hearing that "significant strides have been made in eliminating the blighted conditions in the Times Square area" (R. 193; *see* R. 319). However, the UDC reiterated the conclusory finding in the September 4, 2001 public notice that the proposed condem-

nation of Site 8 South was necessary to remove "blight" in the Site (R. 319).

D. The Decisions Below

Pursuant to Section 207 of the New York State Eminent Domain Procedure Law ("EDPL"), the petitioners sought review of the UDC's determination and findings by filing an original petition for review in the Supreme Court of the State of New York, Appellate Division, First Department (R. 65-85). The petition set forth the constitutional claims which are presented herein, and expressly relied upon the Fifth and Fourteenth Amendments to the United States Constitution, as well as upon the corresponding provisions of the New York State Constitution (12a-13a).[3]

By an order dated February 19, 2002, the Appellate Division stayed the UDC's determination and findings pending the hearing and determination of the petition.

In a decision and order dated June 20, 2002, the Appellate Division confirmed the UDC's determination and findings (3a-11a). The Appellate Division acknowledged that the "[p]etitioners argue that the proposed taking should be barred because the benefit inures to a private party, viz. the New York Times" (6a). The court stated that "our review on this point is limited to ascertain whether the project is rationally related to a conceivable public purpose" (9a), and upheld the proposed condemnation under this highly deferential standard of review as a means of eliminating "blight" (10a).

The Appellate Division also acknowledged that the petitioners had argued that the proposed taking was "in violation of due

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[3] Pursuant to Supreme Court Rule 14.1(g)(1), the First and Second Claims of petitioners' original petition for review in the Appellate Division are reproduced in Appendix C (12a-13a).

process protections of the state and federal constitutions on the ground that the UDC itself created any 'blight' which justifies condemnation since the UDC made it impossible for the owners to reap the value of their land during the last twenty years" (6a). Ignoring the uncontradicted evidence before it (*see* pp. 6-7, 9, 10 *supra*), the court stated that the record was "devoid" of evidence that the UDC had prevented the owners from developing their property (10a-11a).

The petitioners appealed as of right on constitutional grounds to the New York State Court of Appeals. On September 12, 2002, the Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question is directly involved" (2a).[4]

REASONS FOR GRANTING THE WRIT

POINT I

The Taking Is Unconstitutional Because It Is Being Carried Out for the Private Purpose of Substituting One Private Developer for Another, Not for the Purported Public Purpose of Eliminating "Blight"

It is a fundamental principle of federal constitutional law that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though just compensation be paid." *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) (Brandeis, *J.*) (citations omitted). *See also, e.g., Chicago, St. P., M. & O. Ry. v. Holmberg*, 282 U.S. 162, 167 (1930) (Stone, *J.*); U.S. Const. Amdt. 5 ("[N]or shall private property be taken for public use, without just compensation."). The question of whether the

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[4] On August 19, 2002, the taking was consummated. This does not moot the present proceeding, however, because the taking can and will be annulled if this Court should hold it to be unconstitutional.

requisite public use exists is one which the courts – and not the condemning agency – must ultimately decide. *See, e.g., Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 705 (1923).

Here the purported public use is the elimination of "blight" through the development of the property. While this Court has held that the elimination of blight through urban redevelopment may constitute a public purpose which justifies a taking, *see Berman v. Parker*, 348 U.S. 26, 32-36 (1954), the critical distinguishing fact in the present case is that *the owners themselves wish to develop their own property, but have been prevented from doing so by the respondents.*

Where this is true, the elimination of "blight" *per se* can no longer constitute the public purpose required to justify the taking under the Constitution. Since the property will be developed under either scenario, thereby eliminating any remaining "blight," it is not enough merely to say that the elimination of "blight" is in the public interest. This is particularly true where, as here, the uncontradicted record evidence is that there is a "thriving real estate market" in the Project area (R. 406), and that any remaining "blight" would already have been eliminated by the owners themselves if the respondents had only permitted them to develop their own property (*see* pp. 6-7, 9, 10 *supra*). In this connection, the issue is not whether there was "blight" more than 20 years ago when the Times Square Project was first begun; the issue is whether there is "blight" that prevents private development of the property today.

The real public purpose issue in this case is not the elimination of "blight." Rather, the real public purpose issue in this case is whether or not it is a constitutionally sufficient public purpose for the state to take property from a private owner who wishes to develop it in order to give it to another private party who also wishes to develop it.

There is a clear conflict among the lower courts on this issue. In this case, the courts below have answered this question in the affirmative. Other recent decisions have answered the same question in the negative. *See, e.g., 99 Cents Only Stores, Inc. v. Lancaster Redevelopment Agency*, No. CV 00-07572, 2001 WL 811056, at *4-*5 (C.D. Cal. 2001) (striking down the proposed taking of one retailer's property to satisfy the private expansion demands of another retailer), *appeal docketed*, No. 0156338 (9th Cir. Aug. 10, 2001); *Southwestern Illinois Development Auth. v. National City Environmental, L.L.C.*, 199 Ill. 2d 225, 235-42, 768 N.E.2d 1, 7-11 (condemnation of private property to be conveyed to a private corporation to expand its parking lot was not for a primarily public use), *cert. denied*, 123 S. Ct. 88 (2002); *Prestonia Area Neighborhood Ass'n v. Abramson*, 797 S.W.2d 708, 711-12 (Ky. 1990) (taking of property to benefit another private party is invalid); *Tolksdorf v. Griffith*, 464 Mich. 1, 11, 626 N.W.2d 163, 169 (2001) (taking of property for a private road was not for a public purpose).

The importance of this question is difficult to overstate. In any case where the owner of property proposes to develop it, the argument can be made that by that very fact the owner has admitted that the property is "blighted," at least in the sense that it is not yet being used for its highest and best use. If this fact alone is enough to authorize the state to step in and take the property for the benefit of another private developer, then the result will be that the state will be authorized to designate its own preferred developer for any property whose owner has proposed to develop it. Such a sweeping assertion of the power to take private property from one person in order to give it to another cannot be reconciled with the command of the Constitution that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though just compensation be paid." *Thompson*

v. Consolidated Gas Utils. Corp., supra, 300 U.S. at 80.

This Court has never decided the question whether a claim of "blight" is sufficient to entitle a state to take private property from its owner who wishes to develop it and to give the property to another private person to develop instead. No such question was presented in *Berman v. Parker*, *supra*, and no such question was presented in any other case decided by this Court. This Court should grant certiorari in order to resolve this important question.

Any breach in the constitutional wall of prohibition against the taking of private property for private purposes creates the danger that politically influential entities will be able to enlist the cooperation of the state to take the property of others for their own private ends. This danger is well illustrated by the present case, in which one of the world's wealthiest and most influential newspapers has persuaded the respondents to expropriate the property of the petitioners for its new world headquarters. This Court should reaffirm that this is not a constitutionally permitted use of the condemnation power.

POINT II

The Proposed Taking Is Unconstitutional Because It Is Based Upon Respondents' Unconstitutional Decades-Long Prevention of the Development of Site 8 South.

The Due Process Clause, as well as the Takings Clause, of the United States Constitution applies to all proposed condemnation proceedings. *See, e.g., In re Tuthill*, 163 N.Y. 133, 143-44, 57 N.E. 303, 306-07 (1900) (Gray, *J.*).

It is a violation of due process for a state to prevent the owners of private property from developing their property for an indefinite period. *See, e.g., Jensen v. City of New York*, 42 N.Y.2d 1079, 1080-81, 369 N.E.2d 1179, 1179-80, 399 N.Y.S.2d 645, 646-47 (1977) (depriving a property owner of

the use of her property for an indefinite period constitutes a deprivation of property without due process of law); *St. Morris Assocs. v. McMorran*, 35 A.D.2d 997, 998, 318 N.Y.S.2d 121, 123 (2d Dep't 1970) ("The rights of a property owner to the lawful use of his property may not be indefinitely deferred upon the ground that the property might, at some future time, be required for public use. [Citations omitted.]").

In the present case, the respondents have prevented the petitioners from developing Site 8 South for more than two decades (*see* pp. 6-7, 9, 10 *supra*). The respondents' threat of condemnation alone was sufficient to prevent the development of the property, because it made it impossible to secure the financing and tenant commitments necessary for a major office building development (*see* p. 6 *supra*). But the respondents did not rely solely on the overhanging threat of condemnation to prevent the development of Site 8 South; they also took active measures to make sure that the Site could not be developed. Among other things, the respondents litigated state-law statutory issues all the way to the New York Court of Appeals in order to maintain their control over the Site (*see* pp. 6-7 *supra*), and rebuffed a formal offer by the landowners of Site 8 South to develop the Site at no cost to the State or City (*see* p. 7 *supra*). The respondents did all this despite the fact that they had no specific plans for the development of Site 8 South, and despite the fact that they had admitted publicly in 1994 that they might never decide to take Site 8 South at all (*see* pp. 5-7 *supra*).

In light of the foregoing facts – which are undisputed in the record – it cannot be seriously questioned that the respondents' decades-long prevention of the development of Site 8 South was and is a violation of the due process of law which is safeguarded by the United States Constitution. *See, e.g., Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 996-97 (1st Cir. 1983) (reviewing authorities, and holding that a 14-

year cloud of condemnation "exceeds every available indication of what the duration of a reasonable and constitutional freeze might be" (footnote omitted)).

The Appellate Division implicitly recognized that the indefinite prevention of development violates due process of law, but it sought to avoid the application of this principle by saying that the record was "devoid of evidence" that the petitioners were prevented from developing their property (10a-11a). But the unrebutted and uncontradicted evidence in the record was that the threat of condemnation made it impossible for the owners to secure the financing and the long-term tenant commitments necessary for a major development of this kind (R. 183, 272, 277).

Thus the record compels the conclusion that the petitioners have been unconstitutionally prevented by the respondents from developing their property. This, in turn, further confirms that the proposed condemnation of Site 8 South is unconstitutional, because the respondents' purported justification for the proposed condemnation – the alleged persistence of "blight" on the Site – is a direct result of the respondents' own unconstitutional prevention of the development of the Site. Therefore, to permit the respondents to use this pretext to condemn Site 8 South at this time would be to permit them to profit from a situation which has been created by their own unconstitutional acts.

To permit this would be to violate a fundamental principle of justice. As Judge (later Justice) Cardozo wrote in *People v. Schmidt*, 216 N.Y. 324, 341, 110 N.E. 945, 950 (1915):

> "The principle is fundamental that no man shall be permitted to profit by his own wrong. It enters, by implication, into all contracts and all laws. [Citation omitted] . . . ."

See also, e.g., Riggs v. Palmer, 115 N.Y. 506, 511-12, 22 N.E.

188, 190 (1889).

Thus, even if the respondents would otherwise be constitutionally entitled to condemn Site 8 South for the benefit of the New York Times under the pretext of eliminating "blight," the condemnation would violate the owners' constitutional rights because any remaining "blight" on the Site is the direct result of the respondents' unconstitutional course of action in preventing the petitioners from developing their property for a period of more than two decades.

CONCLUSION

For the reasons set forth above, the Court should grant a writ of certiorari to review the order of the Court of Appeals of the State of New York, dated September 12, 2002, dismissing the petitioners' appeal from the decision and order of the Supreme Court of the State of New York, Appellate Division, First Department, dated June 20, 2002.

Dated: New York, New York
December 11, 2002

Respectfully submitted,

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APPENDIX A

Order of the Court of Appeals of the State of New York, dated September 12, 2002

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of September 2002

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 767

In the Matter of West 41st Street Realty LLC, et al.,
Appellants,
v.
New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In the Matter of 632 Eighth Avenue Associates, LLC,
Appellant,
v.
New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In the Matter of Romack Realty Corp.,

Appellant,

v.

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,

Respondents.

In the Matter of Three O Realty LLC,

Appellant,

v.

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,

Respondents.

The appellants having taken appeals to this Court and a motion for continuation of stay to the Court of Appeals having been made in the above causes, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeals be and the same hereby are dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for continuation of stay be and the same hereby is dismissed as academic.

/s/ STUART M. COHEN

Stuart M. Cohen

Clerk of the Court

APPENDIX B

Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, dated June 20, 2002

SUPREME COURT, APPELLATE DIVISION

First Department, April 2002

David B. Saxe, J.P.
John T. Buckley
Ernst H. Rosenberger
David Friedman
George D. Marlow, JJ.

In re Application of West 41st Street Realty LLC, et al.,
Petitioners,

-against-

938
[M-7263]

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In re Application of 632 Eighth Avenue Associates, LLC,
Petitioner,

-against-

939
[M-7234]

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In re Application of Romack Realty Corp.,
Petitioner,

-against-

940
[M-7235]

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In re Application of Three O Realty LLC,
Petitioner,

-against-

941
[M-7285]

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

x

By applications pursuant to Eminent Domain Procedure Law § 207, petitioners seek review of the determination and findings of respondent New York State Urban Development Corporation, issued on or about November 30, 2001, which directed that respondent Empire State Development Corporation exercise its power of condemnation in order to acquire, as necessary, real property designated Site 8 South within the 42nd Street Project.

Guy Miller Struve, of counsel (Rebecca L. Winters, Laura Ann Rosenbury and Lorilee A. Vaughan, on the brief, Davis Polk & Wardwell, attorneys) for petition-

ers West 41st Street Realty LLC, EMM Realty Corp. and Times Square Garage, Ltd.,

Donna-Marie Korth, of counsel (M. Allan Hyman and Edward G. McCabe, on the brief, Certilman Balin Adler & Hyman, LLP, attorneys) for petitioners 632 Eighth Avenue Associates, LLC and Romack Realty Corp.,

Mark I. Silberblatt, of counsel (Novack Burnbaum Crystal LLP, attorneys) for petitioner Three O Realty LLC,

John R. Casolaro, of counsel (Joseph M. Ryan and Susan B. Kalib, on the brief, Carter, Ledyard & Milburn, attorneys) for respondents New York State Urban Development Corporation, d/b/a Empire State Development Corporation and 42nd St. Development Project, Inc.

BUCKLEY, J.

This original proceeding, brought pursuant to Eminent Domain Procedure Law § 207, involves the well-publicized and previously litigated renovation of Times Square (*see, e.g., Jackson v New York State Urban Development Corp*, 67 NY2d 400). Specifically, six real property owners challenge a determination and findings of respondent New York State Urban Development Corporation (UDC) to authorize condemnation and acquisition of real property designated as Site 8 South comprising land across Eighth Avenue from the Port Authority Bus Terminal, a parcel which has been marked for condemnation for some time. Since we find that there is sufficient public purpose warranting respondent's determination to initiate condemnation and that petitioners have failed to

demonstrate any other legal infirmity in the UDC determination, we confirm the determination and dismiss this proceeding.

Section 207 of the Eminent Domain Procedure Law limits the scope of our review to whether: (1) the condemnation proceedings were constitutional; (2) the proposed acquisition is within the statutory jurisdiction of the condemnor; (3) the condemnor's determination and findings were made in accordance with relevant provisions of the Eminent Domain Procedure Law and the Environmental Conservation Law; and (4) the proposed acquisition will serve a public use, benefit or purpose (*Pizzuti v Metropolitan Transit Authority*, 67 NY2d 1039, 1041; *Congregation Gates of Prayer of Far Rockaway v New York City School Constr. Auth.*, 286 AD2d 439). Petitioners argue that the proposed taking should be barred because the benefit inures to a private party, viz. The New York Times. They also allege a taking in violation of due process protections of the state and federal constitutions on the ground that the UDC itself created any "blight" which justifies condemnation since the UDC made it impossible for the owners to reap the value of their land during the last twenty years. Notably, petitioners do not seek judicial relief on either the second or third statutory grounds, so we proceed on the assumptions that the proposed acquisition is within the statutory jurisdiction of the UDC and that the UDC has otherwise complied with relevant provisions of the Eminent Domain Procedure Law and the Environmental Conservation Law. A review of the procedural history preceding this action is necessary to understand the context in which petitioners raise their alternate claims of insufficient public use and inordinate delay in effecting condemnation.

Since 1968, the UDC has been authorized to acquire any real property pursuant to the Eminent Domain Procedure Law if it finds that such acquisition would be necessary or convenient for its purposes (McKinney's Uncons Laws of NY § 6263). Based on legislative findings that many existing industrial, manufac-

turing and commercial facilities in New York's urban areas have become obsolete, dilapidated or underutilized and that such conditions contribute to a wide range of social problems, the UDC was created to engage in a variety of activities to facilitate the acquisition, construction, reconstruction, rehabilitation or improvement of industrial, manufacturing and commercial facilities (McKinney's Uncons Laws of NY § 6252). When considering land use improvement projects, the UDC is required to find that: (1) the proposed project site is substandard or unsanitary and impairs sound growth and development; (2) there is a plan for clearance, replanning, reconstruction and rehabilitation of that area; and, (3) the plan affords maximum participation by private enterprise (McKinney's Uncons Laws of NY § 6260[c]). The real estate involved here, denominated Site 8 South, fronts on Eighth Avenue from 40th to 41st Streets, running halfway toward Seventh Avenue. Petitioners own separate portions of Site 8 South.

The UDC began involvement with redeveloping Times Square with its execution of a memorandum of understanding in 1980 followed by a general project plan in 1984. The New York City Board of Estimate authorized development of sites later that year based on UDC plans to develop the West 42nd Street area to overcome blight, physical and economic decay, and crime and frightening street life. The Court of Appeals upheld UDC's exercise of eminent domain power when community residents, area businesses and property owners challenged various aspects of these plans (*Jackson v Urban Development Corp*, 67 NY2d 400).

The 42nd Street Development Land Use Improvement Project aimed at revitalization of approximately 13 acres of land in the Times Square area of midtown Manhattan. The earliest redevelopment plans called for a retail mart on Site 8 with a pedestrian bridge to the Port Authority terminal. Empire State Development Corporation (ESDC), a subsidiary of UDC, has carried out

the project in successive stages: (1) taking title to nine acres in 1990; (2) acquiring Site 7 in 1994; and (3) acquiring Site 8 East in 1995. Site 8 South and Site 8 North remain the last privately held sites in this project's area. Revised plans in 1994 deferred the retail mart while entertainment and tourism were developed on Site 8 North, on Eighth Avenue between 41st and 42nd Streets. Negotiations between ESDC and The New York Times began in late 1999 and produced a memorandum of understanding in June 2000 which contemplated that ESDC would condemn Site 8 South and lease it to the Times. A high rise office tower would be built at Site 8 South providing the Times with a new headquarters, as well as providing 700,000 square feet of space for other office tenants. The tower would additionally include condominiums, a new subway entrance, mandatory ground-floor public amenities, a 350-seat auditorium, a gallery and retail space. Witnesses at a public hearing conducted by ESDC in 2001 testified that this project would keep the Times headquartered in Times Square, add needed office space, create employment, increase retail revenue, attract further economic improvement to the larger area, and address a critical shortage of commercial space. Other testimony detailed how the proposal would provide a needed spur to Eighth Avenue development by linking the renovated Penn Plaza in the 30s with the Worldwide Plaza in the 50s. Other witnesses testified that much of the original blighted condition of the Site 8 South area remained unchanged during the past two decades. The businesses in the site include five adult entertainment centers and low-end retail and food establishments. An active street drug trade persists.

Project opponents contended that urban blight had been virtually eliminated in the project area. Alternatively, to the extent that urban blight remained, opponent witnesses claimed that private development had been effectively precluded due to the potential for condemnation which had existed for twenty

years.

The eminent domain power does not originate in the constitution but is a "necessary attribute of sovereignty . . . . The power of eminent domain is the right of the State, as sovereign, to take private property for public use upon making just compensation" (*People v Adirondack Railway*, 160 NY 225, 236-237, *affd* 176 US 335). Of the two limitations on the exercise of this power, only public use is at issue here. Exercise of the eminent domain power cannot be for the sole benefit of a private party (*Thompson v Consolidated Gas Utilities Corp*, 300 US 55). Public use only requires "an evident utility on the part of the public" (*Bloodgood v Mohawk & H.R.*, 18 Wend 9). While a public benefit or use must be present, it is "broadly defined" and our review on this point is limited to ascertain whether the project is rationally related to a conceivable public purpose (*Vitucci v New York City School Constr. Auth.*, 289 AD2d 479, 481; *Fisher v Urban Development Corp*, 287 AD2d 262, 263; *Greenwich Associates v Metropolitan Transportation Auth*, 152 AD2d 216, 219, *appeal dismissed* 75 NY2d 865). The scope of our review is necessarily narrow since this exercise of the eminent domain power is a legislative function (*Kaskel v Impellitteri*, 306 NY 73, 80, *cert denied* 347 US 934; *New York City Housing Auth v Muller*, 270 NY 333, 339). A separate constraint is a consequence of our review of a determination made after a hearing. The ESDC "public purpose" determination must be affirmed if there exists "substantial evidence" in the hearing record (*Jennings v New York State Office of Mental Health*, 90 NY2d 227, 239). Petitioners could only prevail in this proceeding if they demonstrated that the determination is not rationally related to a conceivable public purpose (*Waldo's Inc. v Village of Johnson City*, 74 NY2d 718, 720; *Jackson v New York State Urban Development Corp*, 67 NY2d 400, 420-421; *East Thirteenth Street Community Assn v New York State Urban Development Corp*, 189 AD2d 352, 359, *affd* 84 NY2d

287).

Petitioners have not sustained their burden of showing that the challenged determination is without foundation (*see, Sunrise Props. v Jamestown Urban Renewal Agency*, 206 AD2d 913, *lv denied* 84 NY2d 809). The record shows that "the exercise of the eminent domain power is rationally related to a conceivable public purpose" (*see, Hawaii Housing Auth v Midkiff*, 467 US 229, 241), that purpose being the further reduction of the blight that has long pervaded the subject area (*see, Rosenthal & Rosenthal v New York State Urban Development Corp*, 771 F2d 44, 46, *cert denied* 475 US 1018). Given the breadth with which public use is defined in the condemnation context (*see, Matter of Fisher v Urban Development Corp*, 287 AD2d 262, 263), we find that a public purpose is dominant, warranting confirmation of the challenged determination, even though a private entity will benefit substantially from its involvement in the project (*see, Matter of Waldo's, Inc v Village of Johnson City*, 74 NY2d 718, 721). We are unpersuaded by petitioners' unsubstantiated assertion that the goals of the urban renewal plan have been achieved (*see, Jo & Wo Realty Corp v City of New York*, 157 AD2d 205, 218, *affd* 76 NY2d 962). Virtually all of the anticipated outcomes of this project clearly serve a public purpose by eliminating a pernicious blight which has impaired the economic development of a midtown Manhattan neighborhood. That a private business may obtain substantial benefits does not call into question the use of eminent domain and, under the circumstances, a statutory purpose of the UDC has been furthered. Petitioners' claim that restrictions placed by respondent UDC upon their use of the subject property have amounted to takings without due process is without merit, since respondents have not deprived any petitioner of the use and enjoyment of its land for a period of indefinite duration (*cf., Jensen v City of New York*, 42 NY2d 1079, 1080-1081). The record is devoid of evidence which would support petitioners'

conclusory allegations that the long-standing prospect of condemnation barred them from ameliorating or eliminating the persistent urban blight in the project area. We have considered petitioners' remaining arguments in opposition to the challenged determination and find them unavailing.

Accordingly, the determination and findings of respondent New York State Urban Development Corporation, issued on or about November 30, 2001, which directed that respondent Empire State Development Corporation exercise its power of condemnation in order to acquire, as necessary, real property designated Site 8 South within the 42nd Street Project, should be confirmed, the applications brought pursuant to Eminent Domain Procedure Law § 207 denied and the petitions dismissed, without costs or disbursements.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 20, 2002

/s/ CATHERINE O'HAGAN WOLFE
CLERK

APPENDIX C

Pertinent Excerpts From the Original Petition Filed in the Supreme Court of the State of New York, Appellate Division, First Department

FIRST CAUSE OF ACTION

35. Petitioners repeat and reallege paragraphs 1 through 34 above as though fully set forth herein.

36. By making it impossible for petitioners and other landowners in Site 8 South to develop their properties for a period of more than two decades, the respondents have deprived the petitioners of property without due process of law and have taken the petitioners' property without just compensation in violation of Article 1, Sections 6 and 7 of the Constitution of the State of New York and the Fifth and Fourteenth Amendments to the United States Constitution.

37. As sought to be applied in the present case, a statutory scheme that would permit the condemnation of petitioners' property to proceed after such a protracted and arbitrary interference with petitioners' property rights would violate Article 1, Sections 6 and 7 of the Constitution of the State of New York and the Fifth and Fourteenth Amendments to the United States Constitution.

38. Therefore, the Determination and Findings under review should be rejected, annulled, and set aside pursuant to Section 207(C)(1) of the EDPL because the proceeding herein was not in conformity with the federal and state constitutions.

SECOND CAUSE OF ACTION

39. Petitioners repeat and reallege paragraphs 1 through 38 above as though fully set forth herein.

40. Respondents' finding that the proposed condemnation of Site 8 South will serve the public purpose of eliminating "blight" is a transparent pretext. In fact, as the record shows, and as the respondents do not deny in their Determination and Findings under review, the petitioners would already have developed Site 8 South, thereby eliminating any residual "blight" therein, but for the unconstitutional refusal of the respondents to permit them to do so.

41. The pretextual nature of the respondents' finding that the proposed condemnation is necessary to eradicate "blight" is further revealed by the fact that, from 1994 until 2001, the respondents' publicly avowed position was that there might be no need to take Site 8 South at all.

42. The undisputed facts in the record – including, but not limited to, the respondents' refusal to consider offers from the petitioners and other developers – overwhelmingly show that the predominant purpose of the respondents in proposing to condemn Site 8 South is not to serve any public purpose, but instead to serve the private financial interests of the New York Times, a private financial corporation with billions of dollars in assets and annual revenues.

43. Under Article 1, Section 7 of the Constitution of the State of New York and the Fifth and Fourteenth Amendments to the United States Constitution, the power to condemn private property can only be exercised in situations where the dominant purpose of the condemnation is a public purpose, and any private benefit is only incidental. In the present case, the reverse is true.

44. Therefore, the Determination and Findings under review should be rejected, annulled, and set aside pursuant to Section 207(C)(4) of the EDPL because the proposed acquisition will not serve a public use.

JAN 13 2003

Nos. 02-909, 02-910

IN THE

Supreme Court of the United States

THREE O REALTY LLC,

Petitioner,

- and -

WEST 41st STREET REALTY LLC, *et al.*,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION and 42nd ST. DEVELOPMENT PROJECT, INC.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Given a record replete with support for the condemning agency's findings of blight, is the constitutionality of the taking undermined by Petitioners' self-serving and unsupported allegations that the blight findings are "pretextual"?

2. Should the condemning agency be barred from implementing a project to cure blight merely because the project is one of the later stages of a highly-successful multi-phased plan?

Statement Pursuant To Supreme Court Rule 29.6

Respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") is a political subdivision of the State of New York constituting a public benefit corporation. 42nd St. Development Project, Inc. is a wholly-owned subsidiary of ESDC.

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Nos. 02-909, 02-910

IN THE

Supreme Court of the United States

THREE O REALTY LLC,

Petitioner,

- and -

WEST 41st STREET REALTY LLC, *et al.*,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION and 42nd ST. DEVELOPMENT PROJECT, INC.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. *The 42nd St. Project*

The 42nd Street Development Land Use Improvement Project (the "42nd St. Project") involves the revitalization of approximately 13 acres of land in the Times Square area of

midtown Manhattan. (R 381).[1] The 42nd St. Project was developed in response to rampant crime, substandard and insanitary conditions, undesirable uses and physical and social blight in the area. (R 86). The New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") and 42nd St. Development Project, Inc. ("42DP") have carried out the 42nd St. Project in phases, beginning in 1990. (R 381, 384). Each of the earlier stages of the 42nd St. Project successfully reduced blight in the areas affected. (R 382-85, 399-400).

The current phase of the 42nd St. Project involves development of a long-blighted area known as Site 8 South (the "Project").[2] The Project calls for the use of ESDC's eminent domain power to acquire blighted, obsolete and underutilized buildings and surface parking lots from 11 different property owners, four of whom are the Petitioners. The Project will reinforce, improve and continue the metamorphosis of the 42nd St. Project area by further eliminating blighted conditions and the resultant drain on municipal resources, enhancing tax revenues, and further stabilizing the Times Square area. (R 373-74, 417).

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[1] "R" citations are to the printed record in the Supreme Court of the State of New York, Appellate Division, First Department. The 42nd St. Project extends from 7th to 8th Avenues between 40th and 43rd Streets.

[2] Site 8 South is across the street from the Port Authority Bus Terminal on Eighth Avenue between 40th and 41st Streets, extending approximately half a block east toward Seventh Avenue.

ESDC underscored the vital need to develop Site 8 South in its November 2001 Determination and Findings:

> The blight in the area takes various forms: socially in disproportionate crime statistics and a tarnished City image, particularly for visitors entering the City at the Port Authority Bus Terminal; physically, in obsolete buildings and underutilized parcels; and economically, in disproportionate drains on municipal services and underutilized tax and employment potential. Eradication of these continuing substandard and blighted conditions will yield benefits for the Project area, the 42nd Street Project area, and the City. (R 373).

The proposed development will provide economic, social and physical benefits to the City and State of New York, and will transform a blighted, deteriorated, substandard, insanitary and underutilized site to full productive use. (R 373-74, 402, 417, 419-21, 640-41, 644). The Project will reduce crime, increase employment, boost tax revenue, and create much needed class A office space in the area. (R 373, 630-35, 641).

As the new headquarters for The New York Times, with an additional 700,000 square feet of office space, retail uses at grade, and an auditorium available for public use, the completed development will be active and alive 24 hours a day. Retail uses will enliven the side streets into the evening hours, attract passers-by, and discourage the current loitering and other anti-social behavior. (R 421). The tower itself, with its glass facade, will provide a dramatic icon for the City's skyline and a visual anchor for the area. (R 425-27).

B. *ESDC's Authority To Acquire The Property*

In 1968, the New York State legislature created ESDC and empowered it to acquire property in any lawful manner, pursuant to the provisions of the Eminent Domain Procedure Law ("EDPL"). New York Urban Development Corporation Act §§ 4 and 13, N.Y. Unconsol. Laws §§ 6254 and 6263. In the case of land use improvement projects, ESDC is required to make findings that the project area "is a substandard or unsanitary area, or is in danger of becoming a substandard or unsanitary area and tends to impair or arrest the sound growth and development of the municipality" and that "the plan or undertaking affords maximum participation by private enterprise, consistent with the sound needs of the municipality as a whole." N.Y. Unconsol. Laws § 6260(c).

ESDC made and updated detailed findings of substandard conditions both in its Basis for Blight Findings and the addenda thereto (R 508-45) and in its Environmental Review Technical Assessment (R 397-428). ESDC also concluded that the Project will allow maximum participation by private enterprise to provide what the City greatly needs – employment opportunities, enhanced tax revenue, and a renewed showing of dedication from the business community to the City. (R 373, 630-35, 641).

C. *The Decisions Below*

In December 2001, Petitioners[3] challenged the Project by initiating an original proceeding in the Supreme Court of

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[3] This brief is submitted in opposition to the petitions for writs of certiorari of (1) Three O Realty, LLC (no. 02-909) and (2) West 41st Street Realty LLC, EMM Realty Corp., and Times Square Garage, Ltd. (02-910). Both petitions were filed against respondents New York State Urban Development Corporation d/b/a Empire State (Cont'd)

the State of New York, Appellate Division, First Department. (R 65-85). Petitioners set forth two claims in their petition. First, they argued that the Project served a private rather than a public purpose. This claim was supported only by Petitioners' own inflammatory assertions that the stated public purpose is pretextual. Second, Petitioners asserted, again without the slightest support, other than their own unsubstantiated assertions, that the proposed taking is unconstitutional because Respondents refused to permit Petitioners to develop their properties. (West 41st St. Pet. App. C (12a)).

On June 20, 2002, the Appellate Division unanimously dismissed Petitioners' challenges to ESDC's determination and findings. The Appellate Division decided the case by rejecting the factual foundations of the Petitioners' arguments. The Appellate Division found as a factual matter that "[t]he record shows that 'the exercise of the eminent domain power is rationally related to a conceivable public purpose,' that purpose being the further reduction of the blight that has long pervaded the subject area." (West 41st St. Pet. App. 10a) (citations omitted). The Appellate Division specifically noted that "[a]n active drug trade persists" at the site (*Id.* at 10a). The Appellate Division also found as a factual matter that "the record is devoid of evidence which

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(Cont'd)

Development Corporation and 42nd St. Development Project, Inc. Because both petitions object to the same urban redevelopment project and present similar factual and legal arguments, Respondents are submitting this single response to these petitions for the Court's convenience.

"Three O" citations refer to the first petition (02-909) and "West 41st St." citations refer to the second petition (02-910).

would support Petitioners' conclusory allegations that the long-standing prospect of condemnation barred them from ameliorating or eliminating the persistent blight in the project area." (West 41st St. Pet. App. 10a-11a).

On June 26, 2002, the Petitioners purported to appeal as of right to the New York Court of Appeals. On September 12, 2002, the Court of Appeals dismissed Petitioners' appeals, stating that "no substantial constitutional question is directly involved." (West 41st St. Pet. App. A (1a-2a)). No discretionary appeal was ever sought by the Petitioners to the Court of Appeals.

Pursuant to a condemnation proceeding in the Supreme Court, State of New York, title to all the properties in Site 8 South was transferred to ESDC on August 19, 2002. Due to ESDC's relocation efforts, the site is already half vacant. For example, more than 120 tenants from one building have moved and received relocation payments, and the owner of that building accepted a multi-million dollar settlement for its property.

At no time during the relocation process have Petitioners attempted to seek relief from any other court. Even after the New York Court of Appeals dismissed their appeals, Petitioners waited nearly 90 days before filing their petitions for writs of certiorari.

ARGUMENT

SUMMARY OF ARGUMENT

Petitioners allege – without any evidentiary support in the record – that the stated public purpose of the Project is pretextual and that they could have developed the site themselves. On the basis of their unsupported assertions, Petitioners are asking this Court to question well-established precedent, which has consistently afforded great deference to legislative judgments.

Given a record replete with support for ESDC's blight findings and public purpose determination, this case does not raise any constitutional issue. The fact that this Project will incidentally benefit private entities does not undermine the constitutionality of the taking.

There is no evidence in the record that Petitioners ever tried to develop Site 8 South on a private basis or that they even had the ability to do so, since they do not control the entire site. Their property is not permanently insulated from condemnation merely because this Project is the latest phase in a highly-successful multi-phased urban redevelopment project.

POINT I

THE DECISION BELOW IS FULLY CONSISTENT WITH WELL-ESTABLISHED CONSTITUTIONAL LAW AND PRECEDENT

A. *In Reviewing Condemnation Decisions, This Court Has Always Afforded Great Deference To Legislative And State Court Decisions*

It has long been recognized that the power of eminent domain, one of the most ancient and significant sovereign prerogatives, grants government and its authorized agents considerable latitude and discretion to take privately owned property, without the owner's consent, for a public use. *See generally* 26 *Am. Jur. 2d Eminent Domain* §§ 1-3. This Court has never held a compensated taking to be unconstitutional.

Judicial review of a condemnation decision is narrowly circumscribed. *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 102 (1954). This Court has long held that "it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241, 104 S. Ct. 2321, 2329 (1984) (*quoting United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

The Court has made clear that:

> when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served

> by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. *Berman*, 348 U.S. at 33, 75 S. Ct. at 102.

Courts may reject a legislative decision to condemn property only if the decision was not "rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. 229, 241, 104 S. Ct. 2321, 2329 (1984). Judicial "deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.'" *Midkiff*, 467 U.S. at 240, 104 S. Ct. at 2329 (*quoting Berman*, 348 U.S. at 32, 75 S. Ct. at 102 and *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

In *Berman*, the Court defined "[t]he concept of public welfare [as] broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." 348 U.S. at 33, 75 S. Ct. at 102-03. It may include beautification and the creation of a healthy, spacious, clean, well-balanced and carefully patrolled area. *Berman*, 348 U.S. at 33, 75 S. Ct. at 102-03. The determination of what constitutes a public use "is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State." *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 705-06 (1923).

B. *The Administrative Record Amply Supports The Condemning Agency's Blight Findings*

The record in this proceeding is replete with findings — and support for the findings — that Site 8 South is marked by substandard and blighted social, physical, and economic

conditions, and that the acquisition and subsequent development of Site 8 South will serve the public interest. The record substantiates the blighted conditions plaguing Site 8 South including, *inter alia*, prostitution, drug use, underutilization, a disproportionate amount of crime and resulting drains on municipal resources and underutilized tax and employment potential. (R 373). Economically, Site 8 South now provides only a fraction of its tax and employment capability.

ESDC's Basis for Blight Finding and the addenda thereto detail the conditions on Site 8 South from 1981 through 2001. (R 508-545). These findings show that blight at Site 8 South pre-dated the 42nd St. Project, that blight continues, and that, without public intervention, there is no reason to believe blight will cease to exist. Despite Petitioners' assertions that blight in Site 8 South was exclusively a problem of the past, ESDC's most recent Basis for Blight Finding (Third Addendum, August 2001) outlines the existing blight in Site 8 South:

* Site 8 South is "developed only to a fraction of [its] theoretical capacity." It is occupied by two large undeveloped parking lots, a parking garage, and several relatively small, low-rise buildings;

* The buildings in Site 8 South generally present a shabby gateway to the Times Square area, particularly for workers, visitors, and tourists arriving in Manhattan via the Port Authority Bus Terminal across Eighth Avenue;

* Prostitution, drug use, and loitering are still common along Eighth Avenue in the vicinity of Site 8 South, particularly around the many sex-related businesses that remain in retail storefronts; and

* These unseemly uses and the resulting lack of most desirous amenities have the secondary effect of discouraging pedestrians from lingering in the area, which has retarded the area's revitalization and adversely affected nearby areas.

(R 544-45).

The 2001 Environmental Review Technical Assessment, performed for ESDC by an independent environmental consultant, spells out how Site 8 South is both underused and underdeveloped:

> [A]ll of the Site 8 S stores are inconsistent with the overall Project's scale, intended uses and atmosphere. Lots 14 and 53 [the surface parking lots] are undeveloped, and at Lot 15, the upper floors are sealed off entirely. None of the existing uses support the Project goals. . . . such as restoring the Project area's role as a positive influence on the adjacent communities, and increasing the Project area's economic contribution to the City as a whole.

(R 419). The 2001 Environmental Review Technical Assessment elaborates on the problems surrounding the sex-oriented businesses in Site 8 South:

> Approximately five adult entertainment uses operate at Site 8 S. . . . Such businesses continue to maintain exclusively sex-related merchandise and, accordingly, continue to create the secondary effects of blight, increased loitering, and crime.

> Site 8 S is the only remaining 42nd Street Development Project site that still retains several adult-related businesses. . . . As a whole, these adult related uses continue to contribute to blighting elements on Site 8 S and within the surrounding neighborhood.

(R 420). The 2001 Environmental Review Technical Assessment also addresses the loitering and lack of street traffic on portions of the Site:

> Portions of Site 8 S continue to attract loitering and other undesired street presence. Tourists and commuters hurry in and out of the area, discouraged by the poor street-level conditions and the lack of positive amenities. Most of the retail establishments close early; for most pedestrians, this absence of positive street activity is highlighted at night by the presence of a bar and sex-related establishments.

(R 420-21). The 2001 Environmental Review Technical Assessment further cautions that these unfavorable conditions will persist in the absence of development on Site 8 South:

> With the exception of Site 8 S and Site 8 N, the blighted conditions within the [Times Square] area are expected to disappear. In 2005, existing uses on Site 8 S and Site 8 N otherwise would remain inconsistent with both the Project and surrounding areas, and would continue to discourage pedestrian activity along the eastern side of Eighth Avenue south of 42nd Street.

(R 421).

The testimony of various community leaders at the September 2001 public hearing on the proposed condemnation of Site 8 South provides direct support for these conclusions. Many individuals described in detail the physical blight, decay, economic underdevelopment, and unseemly business and pedestrian activity that marks Site 8 South. The excerpts that follow from the transcript of the hearing reflect the consistent agreement on the many ways that the public will benefit from the proposed development on Site 8 South.

Bill Daly, the director of public services for the Fashion Center Business Improvement District, described the present conditions of blight in Site 8 South:

> The particular site we are addressing at this public hearing now contains small storefronts that are clustered among five adult entertainment establishments that exist side by side and create the atmosphere of a mini red light district.
>
> Such a concentration of sex businesses, combined with the low-end retail and food establishments, provides an enclave for criminals to loiter and drug dealers to ply their trade on the sidewalk.
>
> It is time to finally put an end to these conditions, and doing so will encourage the rebirth of this part of Eighth Avenue in the West Thirties.

(R 667-68).

Virginia Sullivan, the acting director of the Office of Midtown Enforcement of the Office of the Mayor, echoed those observations:

> The Mayor's Office of Midtown Enforcement fully supports the proposed project to further improve conditions in this area because our tools alone are not sufficient.
>
> City inspectors from the Buildings, Fire and Health Departments assigned to our Office continually issue code violations to the businesses in this area as well as along Eighth Avenue.
>
> Just this past May our Office brought a nuisance abatement action against a premise within the proposed site, 636 Eighth Avenue, used for the fencing of stolen goods and for the sales of drug paraphernalia.
>
> The proposed site also houses mostly adult use establishments, such as adult video stores and peep shows that are not covered by the current Adult Use Laws since they do not fall within the required distance of any sensitive receptor. . . .
>
> These establishments located in the site area attract a less than savory element who linger in front of the establishment morning and night and contribute to the general feeling of unsafety.

(R 669-70).

These statements, and others like them (R 629-32), support ESDC's conclusion that Site 8 South is blighted and that the proposed development will substantially benefit the surrounding area and the City as a whole.

POINT II

THERE IS NO EVIDENCE THAT THE STATED PURPOSE OF THE PROJECT IS PRETEXTUAL

Petitioners argue that "the taking is unconstitutional because it is being carried out for the private purpose of substituting one private developer for another, not for the purported public purpose of eliminating blight." (West 41st. St. Pet., p. 13; Three O Pet., pp. 25-26). That this Project benefits private entities does not negate or even call into question the valid public purpose of the Project. Under ESDC's enabling legislation, ESDC is required to "afford maximum opportunity for participation by private enterprise . . ." N.Y. Unconsol. Laws § 6260(c). The fact that the Project may advance incidental private interests of the New York Times Company and the developer of additional office space is not unlawful and does not detract from its public purpose. *See Murray v. La Guardia*, 291 N.Y. 320, 329-30 (1943), ("[I]f, upon completion of the project the public good is enhanced it does not matter that private interests may be benefited."), *cert. denied*, 321 U.S. 771 (1944); *Hughes v. Consol-Pennsylvania Co.*, 945 F.2d 594, 613 (3d Cir. 1991); *Swan Lake Hunting Club v. United States*, 381 F.2d 238, 242 (5th Cir. 1967) (*citing Hendersonville Light & Power Co. v. Blue Ridge Interurban R. Co.*, 243 U.S. 563, 37 S. Ct. 440 (1917)); *Washington-Summers, Inc. v. City of Charleston*, 430 F. Supp. 1013, 1015 (S.D. W. Va. 1977) (*citing Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161-62, 17 S. Ct. 56 (1896)).

For Petitioners to allege instead that the stated purpose is "pretextual" would require specific proof that the stated purposes are a sham and a fraud. *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 605 F. Supp. 612, 618 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018, 106 S. Ct. 1204. (1986). In *Rosenthal & Rosenthal, Inc.*, the Court considered an earlier challenge to the 42nd St. Project and found that "it would be quite reasonable for the project planners to conclude that this kind of large scale redevelopment, bringing thousands of new people into the neighborhood and radically changing the physical configuration of the area, would further the Project's overall goals of eliminating blight and revitalizing Times Square." 605 F. Supp. at 619.

There is no direct evidence nor can any inference reasonably be drawn that the stated purpose of the Project is pretextual. Petitioners argue this point by stating they could have eliminated existing blight themselves if they had been "permitted" to develop the property. (West 41st St. Pet., pp. 6-7, 14). Yet Petitioners cite no instances of their trying to develop the properties or any denial or interference with any application for a construction permit, zoning variance or financing. Nor do they cite to any regulatory action by Respondents, or any other authority, that interfered with Petitioners' right or ability to develop their property. In fact, Respondents in no way interfered with the financing or development of the Site and, in fact, have no authority to grant or deny building permits or zoning changes.

While Petitioners contend that they could have removed the blight themselves, this claim is entirely unsupported in the record. In fact, the diversity of land ownership on Site 8 South (ten relatively small separately-owned parcels) has prevented private sector assemblage. A lower court drew this conclusion as a factual matter during the valuation proceeding of another

site in the 42nd St. Project. *See Matter of New York State Urban Dev. Corp.* (*Hotel Strand*), Index No. 44607/91 at 7 (Sup. Ct. N.Y. Co. Aug. 18, 1997) ("Nor was there any indication that without condemnation [claimant's alleged potential] assemblage would have been undertaken privately and a market for claimants' parcel (or air rights) created thereby 'within a reasonably close future.'").[4]

Numerous sites in Manhattan have not been developed for decades because of such fragmented ownership, most important for present purposes, West 42nd Street before the earlier stages of the 42nd St. Project. *Rosenthal & Rosenthal*, 605 F. Supp. at 618:

> Nothing in the Constitution prevents a state from deciding that in a particular area diversity of land ownership stands in the way of full economic development, and that assembling a major site to be developed as a piece is the best way to serve the public purposes of eliminating blight, creating jobs, and broadening the tax base.

Petitioners' claim that existing blight will disappear in the absence of condemnation is wholly speculative and belied by decades of inaction at Site 8 South and neighboring properties. This claim is also belied by the record before this Court. Site 8 South was blighted long before the inception of the 42nd St. Project; it was blighted when Respondents issued the Determination and Findings challenged in this proceeding; it remains blighted.

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[4] Pursuant to Supreme Court Rule 15.3 and 24.1(j)(3), a copy of *Matter of New York State Urban Dev. Corp.* (*Hotel Strand*), Index No. 44607/91 at 9a (Sup. Ct. N.Y. Co. Aug. 18, 1997) is reproduced in resp. app. (1a-13a).

The existence of a valid public purpose in eliminating blight in the Times Square area has already been determined. *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 (1986). Petitioners concede the removal of blight is a valid public purpose (Three O Pet., p. 6). Respondents are in a position to remove the blight effectively and efficiently. This conclusion is firmly supported in the record and it is precisely what ESDC was created to do and has done successfully in the 42nd Street Project to date.

By arguing that ESDC should have chosen one of the Petitioners to develop Site 8 South, Petitioners are, in effect, arguing that ESDC did not choose the best, most efficient or most desirable way to go about removing blight at Site 8 South. The necessity and expediency of a taking, however, is not a question for the courts:

> That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. *Adirondack Railway v. New York City*, *supra*, 176 U. S. at 349, 20 Sup. Ct. 460; *Shoemaker v. United States*, 147 U.S. 282, 298, 13 Sup. Ct. 361; *United States v. Gettysburg Electric Railway*, 160 U.S. 668, 685, 16 Sup. Ct. 427; *Boom Company v. Patterson*, 98 U.S. 403, 406. Neither is it any longer open to question in this court that the Legislature may confer upon a municipality the authority to determine such necessity for itself. *Bragg v. Weaver*, *supra*, 251 U. S. at 58, 40 Sup. Ct. 62; *Sears v. City of Akron*, 246 U.S. 242, 251, 38 Sup. Ct. 245. The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.

Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 678, 43 S. Ct. 684, 689 (1923).

Petitioners also argue that this taking is unnecessary because their own properties are not blighted. (Three O Petition, p. 20). As the excerpts from the record cited above demonstrate, Site 8 South is entirely blighted. Two of the Petitioners herein own the two wholly underutilized surface parking lots on the site. Even if isolated pockets of the site were found not to be blighted, however, the relevant inquiry focuses on the condition of the site as a whole. *Rosenthal & Rosenthal*, 605 F. Supp. at 615-16, 617; 771 F.2d at 46. This Court has long held that a condemning agency may take for a public use property "which, standing by itself, is innocuous and unoffending." *Berman*, 348 U.S. at 35, 75 S. Ct. at 104. The Court reasoned as follows:

> If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. . . . [C]ommunity redevelopment programs need not, by force of the Constitution, be on a piecemeal basis — lot by lot, building by building. It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. . . . It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.

Berman, 348 U.S. at 35-6, 75 S. Ct. at 104 (citations omitted).

POINT III

RESPONDENTS ARE NOT BARRED FROM IMPLEMENTING A PROJECT TO CURE BLIGHT MERELY BECAUSE THE PROJECT IS ONE OF THE LATER STAGES OF A MULTI-PHASED PLAN

Petitioners argue that inclusion of their property as part of the 42nd St. Project prevented them from developing their property in violation of their due process rights. (West 41st St. Pet., pp. 16-19). They claim that because it was well-known that their property was part of the 42nd St. Project and might one day be condemned, they were unable to obtain financing or long-term-tenant commitments. Petitioners then claim that as a result of this alleged deprivation, their property is now insulated from condemnation entirely. Petitioners' claims are unsupported in the record as a factual matter; they are unsupported by the cases they cite; and they are barred by established precedent.

Confronted with pervasive and persistent blight in older urban and commercial areas throughout this State, the New York State Legislature recognized the need for a sustained effort by the public sector in conjunction with the private sector to remedy these conditions. That Respondents have already made substantial progress in the area does not mean that they cannot carry out the remaining phases of the 42nd Street Project.

Petitioners do not and cannot argue that their ability to develop their property was directly prevented by some action of ESDC, such as refusal to issue a building permit or passing of restrictive zoning rules. In *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241 (1971), the New York Court of Appeals

addressed the *de facto* taking concept implicitly raised by Petitioners:

> [T]he concept of *de facto* taking has traditionally been limited to situations involving a direct invasion of the property or a direct legal restraint on its use . . . and to hold that there can be a de facto taking appropriation absent a physical invasion or direct legal restraint would, needless to say, be to do violence to a workable rule of law.

In *City of Buffalo*, the city told the property owner of its intent to condemn, led him to move his printing business, and then delayed several years before deciding to condemn his property. The Court of Appeals held:

> The facts herein fail to disclose any act upon the part of the condemning authority which could possibly be construed as an assertion of dominion or control . . . We simply have a manifestation of an intent to condemn and such, even considering the protracted delay attending final appropriation, cannot cast the municipality in liability upon the theory of a 'taking' for there was no appropriation of the property in its accepted legal sense.

City of Buffalo, 28 N.Y.2d at 255.

The record is devoid of any facts that Respondents have in any way restricted Petitioners' rights to develop their property. At best, Petitioners are claiming that their right to develop their property was impaired as a result of public discussion and plans to redevelop through condemnation,

if necessary. The planning and attendant publicity, controversy, litigation and delay with respect to multi-billion dollar remedial projects do not, however, rise to the level of a *de facto* or regulatory taking of property.

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as 'a taking' in the constitutional sense.

City of Buffalo, 28 N.Y.2d at 255 (*quoting Danforth v. United States*, 308 U.S. 271, 285, 60 S. Ct. 231, 237 (1939)). If Respondents were responsible for affirmative, value-depressing acts that resulted in diminished property value, Petitioners could seek damages under a theory of condemnation blight. *Niagara Frontier Building Corp. v. State of New York*, 33 A.D.2d 130, 133 (4th Dep't 1969), *aff'd*, 28 N.Y.2d 755 (1971); *City of Buffalo*, 28 N.Y.2d at 257-58. Petitioners' resulting award would "be based on the value of the property as it would have been at the time of the *de jure* taking, but for the debilitating threat of condemnation." 28 N.Y.2d at 258. Petitioners allege no such acts because none occurred. Even if they had occurred, the remedy is damages in the condemnation proceeding not an injunction against taking the property.

Petitioners also argue that Respondents actively prevented development of Site 8 South by "litigat[ing] state-law statutory issues all the way to the New York Court of Appeals" and by "rebuff[ing] a formal offer by the landowners of Site 8 South to develop the Site." (West 41st St. Pet., p. 17). In fact, it was two of the Petitioners herein

who filed an action seeking declaratory relief that acquisition of their property was time-barred. Petitioners lost that action and unsuccessfully appealed to the New York Court of Appeals. *250 West 41st St. Realty Corp. v. New York State Urban Dev. Corp.*, 277 A.D.2d 47 (1st Dep't 2000), *leave to appeal denied*, 96 N.Y.2d 705 (2001). The Court of Appeals denied the requested declaratory relief.

While that action was pending, ESDC and 42DP representatives met with more than a dozen developers, including a principal of one of the Petitioners concerning possible development of Site 8 South. (R 182). The principal of Petitioner West 41st St., which only took title to property at the Site in 2001, submitted a letter to Respondents in 1999, stating that the plaintiffs who brought the state court action seeking a declaratory judgment (referenced in the preceding paragraph) would discontinue that action with prejudice if West 41st St. were designated the sole developer of Site 8 South. (*Id.*) In fact, West 41st St. explained in the letter that the plaintiffs in that action (two of the Petitioners herein) were *contractually obligated to agree to condemnation* if he became the sole developer of the Site. (*Id.*). Thus, the Project would have proceeded unchallenged by several of the Petitioners if ESDC had simply chosen the now disappointed West 41st St. as developer, even though the public-private partnership would create the same public use issues alleged here.

The large size of Site 8 South mandated, and 42DP actively searched for, a creditworthy developer with the strong prospect of a major tenant in the private market. West 41st St. did not present a specific proposal, did not demonstrate to 42DP that it had financing in place, and did not have a long-term commitment from a major tenant.

POINT IV

THERE IS NO CONFLICT AMONG LOWER COURTS THAT WARRANTS THIS COURT'S REVIEW AND CERTIORARI SHOULD BE DENIED

One of the Petitioners argues that "[t]here is a split in the Circuits and the State Courts on whether pretextual blight findings may satisfy the Takings Clause's 'public use' requirement." (Three O Pet., p. 21). The other Petitioners argue that there is a conflict among courts as to whether it is constitutionally permissible to take private property from one owner *in order* to give it to another landowner for its private purposes. (West 41st St. Pet., pp. 14-15). Both these arguments are preposterous. No case has ever held that a pretextual blight finding is sufficient to satisfy the Constitutional public use requirement. Nor has any case in modern jurisprudence ever held that the state may take private property for the purely private *purpose* of giving it to another landowner.

A close review of the cases cited by Petitioners indicates that other courts reviewing condemnation decisions routinely apply the same principles of condemnation law as the court did below. The only material differences between the cases cited by Petitioners and this case are the facts and outcomes of the respective cases. That different facts produce different outcomes hardly suggests a conflict. The purported conflict simply does not exist and review by this Court is unnecessary.

Dated: New York, New York
January 13, 2003

Respectfully submitted,

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APPENDIX

APPENDIX — MATTER OF NEW YORK STATE URBAN DEVELOPMENT CORPORATION
(Hotel Strand)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 24

In the Matter of the Application of the New York State Urban Development Corporation to acquire title in fee to certain real property necessary for a land use improvement project known as

42ND STREET DEVELOPMENT PROJECT

Index No. 44607/91

Claimant: 206 WEST 43RD STREET HOTEL CORP
(HOTEL STRAND)
Block 1014, Lot 37
206-208 West 43rd Street
New York, New York

PARNESS, J.:

This is a proceeding under Article 7 of the EDL to determine the compensation to be paid claimant in this condemnation proceeding. Vesting date was April 18, 1990. The subject premises was taken as part of the 42nd Street Time Square Redevelopment Project (Project). It contains a 12 story and basement hotel with two street level store spaces sited on a 30' x 100' lot and is located on the south side of 43rd Street some 100 feet west of Seventh Avenue in the Times Square area of Manhattan (206-208 West 43rd Street). The property was assessed at $1,260,000 (transitional $1,072,000).

Appendix

The hotel has a total of 107 rooms, 45 with private bath and 62 without. At vesting it was closed, by court order, because of pervasive drug activity. When operating it appeared to be more of a SRO rooming house rather than a hotel providing, basically, shelter at modest prices with minimum tradition hotel services. The posted "day rates" can best describe this type of hotel and some of its daily clientele. Built in 1905, the building had been permitted to deteriorate both physically and in the manner of its operation.

Essentially claimant's appraiser, Albert, opined highest and best use to be demolition of the existing structure and utilization of the lot for high rise development either by itself or in conjunction with adjoining properties made similarly available for development (Tr 2667, 2677). Through his analysis of comparable sales of properties purchased for development, at or near the Times Square area, he found a development land value for the subject parcel of $100 per square foot (S/F) when a 1987 valuation date is used, and $110 S/F for the vesting date in 1990.

Albert's referencing of 1987 for a valuation rate is grounded in his opinion that absent the "threat of condemnation" — which he contends began late in 1970's or early 1980's when word of the proposed project became public — the property would have been developed as were others in the mid Manhattan area during the heightened building period of the 1980's. As examples, he cites certain hotel and other commercial construction which took place at that time just north of the subject parcel. Such development was spurred on in part by zoning changes which, under certain conditions, granted an increase in the permitted

floor area ratio (FAR) from 15 to 18, resulting in increases in buildable areas permitted on a site. Albert therefore, in determining his land value, selects 1987 valuation date so as to obtain the benefit of this potential enhanced FAR. However, he also submits an alternate appraisal at the FAR 15 in affect on the date of vesting.

As another valuation approach, Albert hypothesized retention of the existing operating hotel for which he obtains a value based upon analysis of comparable sales of hotels and in his rebuttal appraisal, through income capitalization. He then opined an additional value based upon presumed sale of the property's air rights to a developer of a neighboring site. This is predicated again upon his assumption that private development would have occurred in the block in which the subject property is located absent the project.

His damage values, whether he opines sale and demolition of existing structure, or in the alternative, retention of the hotel and sale of air rights, of course, differ depending on whether an FAR 15 or 18 is applied to his lot square footage.

An FAR of 18 (his valuation date 4/18/87) produces for this expert a vacant lot value, after deducting the cost of demolition, of $4,800,000.00 while for a FAR of 15 he finds a vacant lot value of $4,370,000.00.

As stated, under his alternate valuation approach, he retains and obtains a value for the existing structure with an additional value based upon a sale of unused air rights to hypothesized adjacent development site. From his analysis of comparable hotel sales he finds a value for the subject

premises of $80 per S/F of gross building area which when applied to the existing hotel's 28,315 S/F results in a hotel building value of $2,265,000.00. To this he adds an additional $1,100,000.00 for saleable unused air rights (16,880 S/F at $90 a S/F) to yield a total damage value of $3,365,000.00.

Condemnor's expert, Haims, found present use as highest and best. He obtained value through income capitalization. From what he determined to be the hotel's actual gross income from room rentals, he obtained a fall-out room rate of $30 a day. This $30 daily rate when annualized (365 days) and applied to the 107 rooms and then subjected to a vacancy rate of 50% which Haims opines for this hotel, results in a gross room rental income of $600,000 (30/day x 365 days x 107 rooms x 50% vacancy). To this he added $55,500 as potential street level store rental income (10,000 S/F at $55 S/F) and $10,000 for potential signage income. The result is an effective gross rental income of $668,150 (after a 5% [$2,750] allowance for vacancy and collection loss against non-payment-hotel income). From this gross he deducts stabilized expenses of $434.00 (see Haims' appraisal P. 60) obtained through his analysis of comparable hotel expenses yielding a net operating (NOI) income of $235,000 before real estate taxes. He then deducted real estate taxes in the sum of $45,854. He anticipates an increase of $9,929 over the property's present taxes of $35,924 as a result of the values found for this property (P. 61 of his appraisal). After deducting taxes, he subjected the resulting NOI of $189,146 to a capitalization rate of 11.6% which yielded his value for this property of $1,600,000.

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Essentially, the great disparity in value conclusions is due to the experts differing opinions as to the properties "highest and best use"; i.e. Haims adopting present use and Albert a future one. Highest and best use determines value and compensation to be paid whether or not it is the present or existing use (Matter of the City of New York [Dexter Motors Inc.], 21 A.D.2d, 652, aff'd, 16 New York 2d 814).

Albert contends that, but for the threat of the instant condemnation from the late 1970's onward, the subject parcel's, highest and best use was as part of a development site and absent the project it would have been marketable during that period at appropriate development land values. Haims disputes this, opining that the development in the immediate block in which the subject property was located was precluded by various socio-economic factors, such as crime, a large homeless population, land marking of adjoining theatres, and cost of assemblage.

While it is always difficult to speculate as to what would probably have happened with the subject property had not the project taken place, certain factors are particularly relevant as to such probability. What certainly is relevant is the social and economic conditions of this portion of Times Square which conditions pre-existed the project, particularly as to their impact upon redevelopment.

The 42nd Street Development Project had as its principal purpose the elimination of blighted conditions in certain portions of the Times Square/42nd Street area, and replacement with attractive and economically productive uses. The project area focused on two blocks facing 42nd Street from 7th to

8th Avenus. Included also are certain properties facing the Port Authority Bus Terminal and others in the Times Tower block, the "crossroads" block bounded by 7th Avenue, Broadway 41st and 42nd Streets as well as a portion of the block between 42nd and 43rd Streets east of Broadway.

The original development of Times Square as a central commercial and entertainment area can be traced to the early 1900's when it became a transportation hub due in no small part to the new subway system. During these early periods some of the famous commercial buildings such as the Times Tower and Astor and Knickerbocker hotels were opened. With legitimate theatre development, the area in the early period became famous as the "Great White Way". However, by the late 1920's and early 30's, the area became honky tonk. Many of the theatres in the project area were converted to movie houses. Deterioration began and almost no construction occurred in the project area since the early 1920's, the legitimate theatre activity having moved to the north.

By the time the 42nd Street project area was proposed in the early 1980's, as contrasted with the surrounding area with new hotel, office and residential construction, the project area contained either vacant lots or underutilized parcels supported by deteriorated and obsolete buildings. The economic and social character of the project area was determined principally by street level retail uses which contributed to and supported the street conditions prevailing at that time. Such uses included 14 movie houses whose fare consisted of either pornography, horror or martial arts. These operated over long hours with high patron turnover and

contained a considerable amount of illicit activity. In fact 42nd Street contained the largest concentration of sex related businesses in the city and many were located near the area movie houses. Contributing also to the character of the area was the fact that 16 establishments, excluding restaurants, sold either beer or liquor. The project area's 20 plus fast food shops, amusement and arcades while posing no direct problem, did reinforce the area's problems by providing support and loitering areas for those engaged in questionable street activity.

The three area "hotels", the Strand, National and Carter similarly provided support in part for such illegal activity as prostitution and drug dealing. Indeed, the subject Strand Hotel was closed for that latter reason.

Details with respect to the high degree of illegal street or other related sordid activities which gave to the area its unsavory reputation are set forth in greater detail statistics in Haim's appraisal and in the final Environmental Impact Statement (§2, 82-87) submitted in connection with this project. Indeed the blighted condition of the area was recognized by the Court of Appeals in Jackson v. UDC, 67 New York 2d 400, 412 (one of the many decisions involving unsuccessful challenges to the project).

In sum, the area pre-project had been the subject of pervasive deterioration both physically and socially over many years, with a long standing unsavory reputation which resisted change or rehabilitation. Any examination as to the project area's potential for redevelopment absent the project

thus must be had against this historical backdrop of area crime, loitering, deterioration and general unsavory reputation.

Addressing specifically Albert's development claim for the subject property, he does not seriously urge or persuade that any developer would build just on claimant's 18' x 120' lot. Such a structure would not have been economically viable. Rather he contends that it would have been acquired to be part of an assemblage site for a large mega building to be developed over the eastern portion of claimant's block bounded on the west by the Lyric and Victory theatres and on the east by 7th Avenue, an area of some 29,000 S/F. However, while this valuation is grounded upon the premise that an appropriate site would be assembled no specifics are provided identifying by whom, how large and when. Further, even if such hypothetical developer were considering assembling an appropriate size site in this area he would be immediately aware that it would be surrounded still by the unsavory street activity that permeated the project area and gave it its reputation. Such developer would not have the advantage of condemnation to globally eliminate these problems.

In addition to the deterrent effect street conditions have had and would have in discouraging commercial investment in redevelopment there is the further potential difficulty in assemblage due, not only to the fact that the parcels in this area are in different ownerships, but also because of cost of acquisition. Purchase of and assemblage would not come cheap or easy. These properties contain high volume and highly profitable cash businesses which could and would resist

development (as they did this condemnation). Parenthetically, the other project claimants' properties, which made up Albert's proposed development site have submitted damage values similarly predicated on development in the area aggregating some $65,000,000, values even in excess of their own vacant land values. Unlike compensation paid in condemnation, which is fixed at market, a private assemblage must pay what is asked.

While fair market value may take into account a parcel's probable assemblage with other properties such "speculative use must be substantiated by proof of facts that indicate a likelihood that the property would be put to such use within a reasonable close future" (Matter of the City of New York (Dexter Motors Inc.), *supra* 21 A.D.2d, 652, 653, aff'd, 16 New York 2d, 814).

In the instant case there is "no probative evidence to support the conclusion that the other properties were available to form an assemblage with the subject parcel" (S. Robert Scheur, as Trustee v. State of New York, 65 A.D.2d, 921, Matter of City of Rochester v. Iman, 51 A.D.2d, 651). Nor was there any indication that without condemnation such assemblage would have been undertaken privately and a market for claimants' parcel (or air rights) created thereby "within a reasonably close future". In sum, "if the parcels were not brought together by a taking under eminent domain the chance of their being united by agreement or purchase in such a way as to be available well may be regarded as too remote and speculative to have any legitimate effect upon the valuation" (McGovern v. City of New York, 229 U.S. 363, 372).

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Also significant on the probability of development at the times suggested by claimant is the fact that the very climate for development in the 1980's upon which claimant bases a market for its property, resulted in a glut of new commercial space. So much so that the instant project was amended to put on hold the original commercial towers planned for the area.

Even more unpersuasive is claimants hypothesized retention of the existing hotel with sale of excess air rights to an adjacent site. Transfer development rights (TDR) have limited potential recipients. In this case they would be adjacent sites to the east and west of claimant's parcel.

Besides claimant's disreputable hotel, the eastern portion of claimant's block contained fast food establishments, bars and other sources of beer and liquor, a pin ball arcade and an active movie all operating on extended hours. Immediately to the west of this area were theatres and other businesses which similarly attracted unpalatable street activity, conditions, which at least prior to this project, showed no sign of change in the foreseeable future. It is not reasonable to assume that a developer would expend sums to acquire and put up a first class building to still be surrounded by continuing deterioration and crime. Nor, as indicated, are there sufficient facts to indicate when, if ever, a demand for said TDRs would be created. What is also interesting is that almost all other claimants' parcels in this portion of the project area, in order to maximize value claims, opine retention of the existing structures with sale of unused air rights. It is not entirely clear who is to receive all these air rights since none have opted to be a receptor site.

In sum, claimant does not persuade that there was a reasonable probability that its property or air rights would have been marketable for assemblage purposes. There certainly was no hint of it prior to 1980. Indeed, the only apparent assemblage for development in the project area was that on a 42nd Street/8th Avenue in the 1960's, and that failed leaving a site that became a parking lot and remained so at vesting.

It is therefore clear that the instant condemnation or "threat" thereof did not effect the value of the claimant's property. To opine that this 18' by 120' lot or its air rights would have been marketable at an enhanced price based upon a need by some yet unknown site assembler for claimant's land or TDRs would be pure speculation and is unsupported by the facts in this case (Scheuer v. State of New York, 65 A.D.2d 921).

"Care must be taken, however, not to substitute for reality the mere hope of the owner that the property may be used for some specific purpose. Therefore, in order to merit consideration the potential user must be so reasonably probable as to motivate a prospective purchaser in his desire to acquire the property" (Nicholas, Law of Eminent Domain, Section 12B.14[2], citing U.S. v. Toronto, Hamilton et al (338 v. U.S. 396, McGovern v. New York, 229 U.S. 363). Such has not been demonstrated herein.

The court thus concludes that highest and best use for this property is as it existed and the compensation to be awarded will be determined upon that basis. Though both

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Haims and Albert obtained value for the hotel through analysis of "comparable hotel sales", to obtain an adjusted S/F building value for the subject property, the Court finds, because of the limited number of comparables used, and significant difference in the hotel service and ambience provided by these comparables in contrast with what the Strand offered, and the exaggerated adjustments required to obtain "comparability", that the sales comparison approach to value, is not persuasive in this case.

While there may be some slight entrepreneurial aspect involved in income generation, the Court concludes that both appraisers alternative income capitalization analyses can more appropriately be employed herein to obtain value. The Court adopts claimant's $40 daily room rate (a melded rate which takes into account a potentially higher rate for rooms with bath and a lower one for those without). The Court further finds that by reason of the age and condition of the building, the minimal services provided and the fact that a substantial number of rooms are without bath, that a 50% vacancy rate is appropriate. The result is a gross stabilized annual room rental income of $781,000 ($40 x 365 [days] x 107 [rooms] x .50 [vacancy rate]).

For the 10,000 s/f of available store space the Court finds from an analysis of comparables submitted a s/f value of $60 to yield a store income of $60,000. A further income of $15,000 is found for potential signage. The foregoing results in a total gross building income of $856,000. From this the Court will deduct a 5% vacancy factor from the store and signage income ($3,750) leaving a gross effective income of

$852,250. Against this the Court will deduct stabilized expenses in the manner suggested by Albert, as follows:

Real Estate Taxes (actual)	$ 35,925
Room expense (30% of hotel income)	234,000
Energy (2.50/room/day x 365x107x.50)	48,818
Administrative (hotel) 10% of hotel income	78,100
Insurance ($2.00 room/day x 365x107x.50)	39,055
Reserves (3.5% hotel/income)	27,335
Room rehab., $3,000/room-15yr. amortization	64,031
Property operations/maintenance ($3.00 room/day x 365x.50)	58,582
Management (5% of gross building income)	42,612
Total	$628,458

The result is a net operating income of $223,802 ($852,250 - $628,458). Adopting a capitalization rate of 11% results in a damage value for this property of $2,034,565. Settle order and decree.

Dated: 8/18/97 J.S.C.

No. 02-910

Supreme Court, U.S.
FILED
JAN 21 2003
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

WEST 41ST STREET REALTY LLC, EMM REALTY CORP., and TIMES SQUARE GARAGE, LTD.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, 42ND ST. DEVELOPMENT PROJECT, INC., 632 EIGHTH AVENUE ASSOCIATES, LLC, ROMACK REALTY CORP., and THREE O REALTY LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF

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REPLY BRIEF

The purported restatement of the questions presented in respondents' Brief in Opposition (Br. Opp. i) is not a genuine restatement of the questions presented by our petition (West 41st St. Pet. i). Instead, respondents have tried to substitute entirely different questions, which they obviously hope will be easier to answer than those we actually presented.

Respondents argue at great length that the record shows that there is some remaining blight in Site 8 South (Br. Opp. 2-3,

9-15). This simply begs the question presented by our petition, which is whether, even assuming that there is some residual blight, the respondents can take the property in order to let another private party develop it *when the owners want to develop their own property, and have been unconstitutionally prevented from doing so for many years by the respondents themselves* (West 41st St. Pet. i, 13-19).

Respondents assert that "[t]here is no evidence in the record that the Petitioners ever tried to develop Site 8 South on a private basis" (Br. Opp. 7). This is simply not so. As set forth in our petition, there is uncontradicted record evidence of the owners' efforts to develop their property (West 41st St. Pet. 6-7, 9-11), including an unsuccessful lawsuit seeking to remove respondents' threat of condemnation (*id.* at 6-7) and an offer by the owners of the majority of the square footage in Site 8 South to develop it without any public subsidies of any kind (*id.* at 7). Indeed, later in their brief respondents admit both the lawsuit and the offer, although they try to downplay their obvious significance (Br. Opp. 22-23).

Respondents also argue that the owners could not have developed the Site themselves (Br. Opp. 16-17, 22-23), but there is no record evidence to this effect, and respondents do not cite any (*see id.*). The only "evidence" adduced by respondents on this point is an earlier condemnation valuation involving a totally different and noncontiguous parcel (Br. Opp. 16-17, 1a-13a). The fact that respondents felt compelled to adduce this inapposite and extra-record "evidence" is powerful testimony to the baselessness of their argument. Respondents do not deny that their own environmental analysts reported that there is now a "thriving real estate market" in the area (West 41st St. Pet. 14, *citing* R. 406). Indeed, that is the obvious reason why the New York Times wants respondents to condemn the property for it.

Thus this case squarely presents the question whether development to eliminate "blight" can serve as the public purpose justifying condemnation when the owners themselves wish to develop their own property, and any residual "blight" is the result of the government's unconstitutional actions in preventing them from doing so over a period of 20 years. Respondents admit that it is constitutionally impermissible to take property from one owner in order to give it to another owner for its private purposes (Br. Opp. 24; *see* West 41st St. Pet. 15, and cases cited). This Court should grant certiorari in order to make clear that this bedrock constitutional principle cannot be evaded simply by intoning the word "blight" as a pretext for taking property from its owners who wish to develop it in order to give it to another private party to develop.

CONCLUSION

For the reasons set forth above and in the petition for certiorari, the Court should grant a writ of certiorari to review the order of the Court of Appeals of the State of New York, dated September 12, 2002, dismissing the petitioners' appeal

from the decision and order of the Supreme Court of the State of New York, Appellate Division, First Department, dated June 20, 2002.

Dated: New York, New York
January 20, 2003

Respectfully submitted,

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